IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO.9388 OF 2004

Zulfekar Rafique Momin. ...Petitioner.

Versus

Hasan Bandubhai Momin & Ors. ...Respondents.

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Mr. G.S. Godbole for the Petitioner.

Mr. P. S. Dani for Respondent No.1 to 8.

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CORAM : DR. D.Y. CHANDRACHUD, J.

April 26, 2005.

P.C.:

Rule, by consent returnable forthwith. Counsel appearing on behalf of the Respondents waives service. By consent of Counsel and at their request taken up for hearing and final disposal.

2. The Petitioner is the original Plaintiff in a suit which was instituted on 4th January 1999 for injunctive relief. An application was filed on 5th July 2004 to allow the Petitioner to amend the

Plaint under Order 6 Rule 17 of the Code of Civil Procedure, 1908. The proposed amendment was for (i) adverting to the City Survey numbers of the property; (ii) claiming the relief of mandatory injunction on the ground that the Respondents have carried out construction during the pendency of the suit; and (iii) seeking a declaration of ownership. The application has been dismissed by the impugned order of the Learned Trial Judge.

3. While dismissing the application, the Learned Trial Judge has held that the Petitioner has failed to give a satisfactory explanation for not mentioning CTS numbers of the property while the suit was instituted. Similarly, it has been held that the details of, when an encroachment was made and work was completed, have not been furnished. The suit, in the present case, was instituted prior to the amendment to Order 6 Rule 17. Having regard to the position in law then obtaining, I am of the view that the Learned Trial Judge ought to have allowed the application for amendment. At this stage, it would neither be appropriate, nor proper for this Court to enter upon a detailed evaluation on the

merits of the case that is sought to be made out in the amendment. That is something which awaits trial. In these circumstances, I am of the view that the Learned Trial Judge was in error in rejecting the application for amendment. At the same time, it would, in my view, be necessary to clarify that the question of limitation in so far as the prayer for mandatory and declaratory relief is concerned, is kept open. In these circumstances, subject to the aforesaid clarification, the application for amendment filed by the Petitioner is allowed. The impugned order of the Learned Trial Judge dated 7th September 2004 is quashed and set aside. However, the Petitioner shall pay to the Respondents costs quantified at Rs.750/-. The Respondent should be at liberty to file an additional written statement to traverse the averments in the plaint as amended. All the rights and contentions, on merits, of the parties are kept open.

4. The petition is accordingly disposed of in the aforesaid terms.

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